

**7535-01-U**

**NATIONAL CREDIT UNION ADMINISTRATION**

**Guidance Regarding Prohibitions Imposed by Section 205(d) of the Federal Credit Union Act**

**AGENCY:** National Credit Union Administration (NCUA).

**ACTION:** Final Interpretive Ruling and Policy Statement 08-1.

**SUMMARY:** The NCUA is issuing an Interpretive Ruling and Policy Statement (IRPS) regarding prohibitions imposed by Section 205(d) of the Federal Credit Union Act (FCU Act) (12 U.S.C. 1785(d)(1)). Section 205(d) of the FCU Act prohibits a person who has been convicted of any criminal offense involving dishonesty or breach of trust, or who has entered into a pretrial diversion or similar program in connection with a prosecution for such offense, from participating in the affairs of an insured credit union except with the prior written consent of the NCUA Board. This IRPS provides direction and guidance to federally-insured credit unions and those persons who may be affected by Section 205(d) because of a prior criminal conviction or pretrial diversion program participation by describing the actions that are prohibited under the statute and establishing the procedures for applying for NCUA Board consent on a case-by-case basis.

**DATES:** This IRPS is effective [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Jon Canerday, Trial Attorney, Office of General Counsel, at the National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428, by email at [canerday@ncua.gov](mailto:canerday@ncua.gov) or by telephone at (703) 518-6548.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

In April 2008, the NCUA Board published a proposed IRPS regarding the prohibition imposed by Section 205(d) of the FCU Act. 73 FR 18576 (April 4, 2008). Section 205(d) of the FCU Act prohibits, without the prior written consent of the NCUA Board, a person convicted of any criminal offense involving dishonesty or breach of trust, or who has entered into a pretrial diversion or similar program in connection with a prosecution for such offense, from becoming or continuing as an institution-affiliated party, or otherwise participating, directly or indirectly, in the conduct of the affairs of an insured credit union. The comment period closed on June 3, 2008. NCUA received seven comments on the proposal. After consideration of the comments, NCUA is finalizing the IRPS, which generally adopts the guidance as proposed.

## **B. Public Comments**

NCUA welcomed general comments on the proposed IRPS. In addition, the Board specifically sought comments as to whether the format of this guidance as an IRPS was appropriate or whether a regulation would be more suitable. The Board invited comments as to whether a specific form, similar to the form required by the FDIC in connection with a similar statute, should be used to request consent pursuant to Section 205(d).

NCUA received seven comment letters in response to the proposed IRPS: two from federal credit unions, two from national credit union trade organizations, and three from credit union leagues. The commenters generally supported the need for the guidance as contained in the proposed IRPS and offered several suggestions intended to assist the Board in improving the proposed IRPS.

Two commenters believed that a regulation was the more appropriate format for the guidance. One of the commenters who favored a regulation thought a regulation provided greater protection to a credit union that might be challenged by a prospective employee. Another commenter believed a regulation was preferable because it would help reinforce a credit union's right to appeal an adverse decision and subject future changes to public notice and comment. A third commenter suggested the guidance

should take the form of a Letter to Credit Unions, believing that format was more familiar to credit union officials.

The Board appreciates the need to provide protection for credit unions that seek to comply with the requirements of the IRPS. However, the Board concludes that the source of the requirement stems from federal statute, namely Section 205(d). Thus, the Board believes that the need to comply with federal law, as augmented by guidance in the form of an IRPS, should be sufficient to protect a credit union. The Board believes that credit union officials should be able to adequately understand and apply the guidance styled as an IRPS and that the right to request a hearing contained in the IRPS provide a credit union a sufficient right to appeal a denial of consent by the Board. Additionally, the Board does not amend its IRPS without providing the public notice and an opportunity to comment. For all of these reasons, the Board believes it appropriate to issue the final guidance in the form of an IRPS.

Four commenters believed that a form should be required in order to request consent. As one commenter observed, the use of a form “is necessary to ensure uniformity and consistency throughout the consent process.” The commenters favoring a form suggested that the form required by the FDIC was a reasonable template that could be modified to fit the needs of credit unions. The Board concurs with the commenters and therefore the final IRPS contains a requirement that applications for consent under Section 205(d) must be presented on the form attached to this IRPS.

A majority of the commenters sought additional guidance from NCUA as to who comes within the prohibition of Section 205(d). In particular, commenters were concerned as to whether independent contractors of a credit union would come within the ambit of Section 205(d), thus requiring credit unions to make inquiry as to the past criminal history of such contractors. Several commenters also expressed concern over the use of the term “de facto employee”, believing it is confusing and has never been defined by NCUA. Another commenter believed use of the concept exceeded the statute and thus was an improper expansion of the scope of the prohibition imposed by Section 205(d). Still another commenter expressed the view that such expansive definitions could require credit unions “to perform background checks on any party with whom it has commercial dealings. . . .” This commenter also believed that Section 19 of the Federal Deposit Insurance Act was clearer and less subjective than the definition in the proposed IRPS. Further, another commenter believed the definition of independent contractor was inconsistent with the FCU Act because the definition cited to Section 206(r), which contains the term “violation of any law or regulation.”

The Board recognizes that the language of Section 205(d) creates uncertainty as to whom the section applies. The terms “institution-affiliated party”, and “otherwise participate, directly or indirectly, in the conduct of the affairs of any insured credit union” are terms dictated by Congress in the statute.<sup>1</sup> Those are terms that are used and defined in various other sections of the FCU Act, as well as in statutes applied by the other federal financial institution regulatory agencies. As a result, a body of case law has developed that further defines these terms. These definitions are fact dependent,

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<sup>1</sup> These are virtually identical terms to those used in Section 19 of the Federal Deposit Insurance Act.

making it difficult to provide easily understood, universal definitions. Neither the OTS nor the FDIC thought it advisable to define similar terms, and the Board is likewise reluctant to attempt to do so.

The Board recognizes that one common concern expressed by commenters was to what extent Section 205(d) applied to independent contractors, and thus required inquiry of such contractors by credit unions. The Board wishes to make clear that not all contractors are subject to the prohibition contained in Section 205(d). The crucial test is the degree or extent to which the contractor participates in the affairs of the credit union. As the proposed IRPS stated, “an independent contractor who influences or controls the management or affairs of an insured credit union, would be covered by Section 205(d).”

The FDIC addressed the issue of affiliated parties and independent contractors in the preamble to its Statement of Policy Pursuant to Section 19 of the Federal Deposit Insurance Act as follows:

Similarly, directors and officers of affiliates, subsidiaries or joint ventures of an insured institution or its holding company will be covered if they are in a position to influence or control the management or affairs of the insured institution. In those cases in which such individuals exercise policymaking functions for the insured institution, they should be deemed “participants.” For example, officers of an electronic data processing (EDP) affiliate

would not typically exercise a controlling influence to the extent that the affiliate simply provides a processing service to the bank. On the other hand, if a mortgage banking affiliate sends loans to an insured institution that the institution is obligated to purchase, then the officers of the affiliate may be participants in the insured institution's affairs. Where an employee of an EDP service has access to sensitive bank records and the ability to manipulate data so as to influence or control the management or affairs of an insured institution, that person will be covered by section 19. The degree of such influence may be controlled by reliance upon the safeguards and internal controls put in place by the affiliate and the bank. Insured depository institutions continue to out source increasing numbers of banking tasks. To the extent that independent contractors are utilized, an analysis similar to that for affiliates may be applied. Typically an independent contractor does not have a relationship with the insured institution other than the activity contracted for by the depository institution.

63 FR 66177, at 66178 - 66179 (December 1, 1998).

The Board agrees with the FDIC's analysis and believes it is applicable to the credit union community as well. Therefore, the Board is of the view that very few of the contractors who perform services for credit unions will be involved to such a degree that

they could be said to be influencing or controlling the management or affairs of a credit union. Only when the involvement of affiliates or independent contractors rise to the level of influencing or controlling the management or affairs of a credit union does the credit union need to be concerned about the criminal past of the employees of the affiliate or independent contractor.

One commenter asked whether it would be sufficient to specify in contracts with vendors that no one who had been convicted of any criminal offense involving dishonesty or breach of trust would be allowed to have dealings with the credit union. The FDIC touched on this question in its preamble, stating that it “expects that the relationship between an independent contractor and an insured institution is to be governed by a written contract, through which the insured institution may require typical safeguards such as warranties and bond coverage.” *Id.*, at 66179. Though not required by the IRPS, the additional contractual restriction on a contractor to not use employees who would otherwise be prohibited under Section 205(d), as proposed by the commenter, would be a reasonable, additional safeguard.

Several commenters expressed concern about the use of the term de facto employee. This is a common employment law concept that was adopted by the FDIC in its Statement of Policy Pursuant to Section 19 of the Federal Deposit Insurance Act to prevent individuals from circumventing the requirements of the law by simply claiming to be an independent contractor. As the FDIC explained:



The FDIC is aware that an effort can be made to evade the coverage of section 19 by “converting” an employee to an independent contractor. In those cases, generally applicable standards of employment law will be used to identify such arrangements, and to find that the person is a “de facto” employee.

63 FR 66177, at 66179 (December 1, 1998).

Whether an individual is actually an independent contractor or an employee (a de facto employee) has profound implications with respect to tax and other employment matters. In determining whether a person must request consent pursuant to Section 205(d), the Board believes it is appropriate to consider what the employee actually does and their relationship to the credit union rather than simply whether they are called an independent contractor. Therefore, the final IRPS retains the concept that de facto employees, as determined by applying generally applicable standards of employment law, will also be subject to Section 205(d). Because it is not possible to provide more concrete definitions, the Board wants to emphasize that credit unions with any questions regarding whether a particular person comes within the scope of Section 205(d) may solicit guidance from NCUA’s Office of General Counsel.

Two commenters expressed a desire for a more comprehensive definition of what offenses qualify as de minimis. One commenter proposed that the Board provide a comprehensive listing of offenses that involve dishonesty or breach of trust. Another

commenter noted that almost every criminal offense could be said to involve dishonesty or breach of trust in some form, and asked whether virtually all convictions would be subject to Section 205(d).

The Board understands the desire by credit unions for more certainty regarding when an application under Section 205(d) is required. However, considering the number of potential jurisdictions that have criminal statutes containing offenses involving dishonesty or breach of trust, it is simply not possible to provide an exhaustive list of such offenses. Thus, it remains the responsibility of each credit union to examine the elements of the statute under which an individual was convicted in order to determine whether it constitutes a crime involving dishonesty or breach of trust.

Another commenter urged the Board to not simply provide the statutory cite to those offenses that qualify for the ten year limitation on the Board providing consent (found at Section 205(d)(2)), but rather to list such offenses separately. The Board is not inclined to provide an exhaustive list. Congress could amend the provision, resulting in the list becoming outdated and inaccurate until the IRPS is appropriately modified. The Board believes the better approach is to cite the reader to the exact statutory provision that contains the most current list of offenses Congress has made subject to the ten year ban.

Five commenters expressed concerns as to whether the proposed IRPS would operate to require credit unions to conduct background checks or other inquiries of existing

employees or institution-affiliated parties, if such investigations were not performed at the time those persons became affiliated with the credit union. In that regard, the Board would note that the prohibition of Section 205(d) has existed in some form since 1970. Since that date, credit unions have been required to make a diligent inquiry as to whether prospective employees or institution-affiliated parties came within the prohibition imposed by Section 205(d). Section 205(d)(1)(B) contains a criminal provision that applies to credit unions and therefore, credit unions should determine for their own protection whether they have sufficiently examined the background of those previously allowed to serve as employees or institution-affiliated parties.

Another commenter requested the Board to make clear that credit unions need not conduct background checks of prospective employees, but rather permit reliance on answers given by applicants. As stated in the proposed IRPS, “The NCUA believes that at a minimum, each insured credit union should establish a screening process which provides the insured credit union with information concerning any convictions or pretrial diversion programs pertaining to a job applicant. This would include, for example, the completion of a written employment application which requires a listing of all convictions and pretrial diversion programs.” The Board is cognizant that background checks are costly and time-consuming. Therefore, the Board agrees with the commenter that credit unions are normally justified in relying on a job applicant’s answers regarding past criminal history. However, if a credit union has reason to believe that an applicant was not being truthful, further inquiry into the person’s past might be necessary under the circumstances.

In order to provide more guidance to credit unions regarding screening of prospective employees, one commenter suggested the Board issue guidance similar to that published by the FDIC on the same topic. We understand the guidance referenced in the comment letter is FDIC's Financial Institution Letter FIL-46-2005, dated June 1, 2005, and entitled "Pre-Employment Background Screening." The guidance in FIL-46-2005, while perhaps useful, is beyond the scope of this IRPS. However, the agency will consider addressing the subject in another forum in the future.

One commenter asked for guidance as to whether "good faith compliance with a similar state law may satisfy the requirements under" Section 205(d). The statute cited by the commenter was a New York law that prevented denial of employment because of a prior criminal conviction unless certain other factors were met. The Board disagrees that reliance on a state law that conflicts with the prohibition imposed by Section 205(d) satisfies the requirements of the federal statute. The Board believes that in this circumstance, Section 205(d), as a federal statute, pre-empts any state law that conflicts with it.<sup>2</sup> Consequently, federally insured credit unions must comply with Section 205(d), even if doing so would appear to be in conflict with a state employment law.

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<sup>2</sup> "Federal preemption of state laws stems from the supremacy clause, U.S. Const., art. V, cl. 2, which provides that the laws of the United States shall be the supreme law of the land, notwithstanding any state laws to the contrary. Preemption may be . . . implied by the nature of federal legislation and the subject matter, even absent a declaration of preemptive intent. Meyers v. Beverly Hills Federal Savings and Loan Ass'n, 499 F.2d 1145, 1146 (9th Cir. 1974)." Opinion letter from Hattie M. Ulan, Associate General Counsel to Peter J. Liska, dated June 11, 1992, subject, Iowa Credit Card Registration Law.

Two commenters suggested that the IRPS specify the length of time the Board would take to act on an application submitted for consent under Section 205(d). One commenter suggested the Board should be able to act on an application within fourteen business days; another suggested within five days. The Board appreciates the credit union community's desire for certainty as to how quickly applications under Section 205(d) will be processed. However, each application is fact specific and varies in complexity. For that reason, the Board concludes that it is impracticable to set a time table for action on such applications. Past applications that have been submitted to the Board have generally been adjudicated within 60 days from submission. In most cases, the time was significantly less. The Board is committed to deciding applications for consent in the future as quickly as possible.

With respect to the factors the Board will consider when evaluating an application under Section 205(d), one commenter suggested the IRPS include two provisions contained in FDIC's regulatory list of factors. Specifically, one of the suggested additions was a provision that would require the Board to consider whether a person's participation in the affairs of the credit union would constitute a threat its safety or soundness or the interest of its members, or would threaten to impair public confidence in the credit union. The other suggested addition would address whether the person would be eligible for bond coverage.

The Board believes the first suggested provision is a valuable factor to be considered and accordingly will add the additional criteria to the final IRPS. Regarding the second

suggestion, the Board notes that the proposed IRPS contained a similar provision to that suggested (“(6) The applicability of the insured institution's fidelity bond coverage to the person;”). Thus, because of the similarity of the two provisions, the Board will retain the criteria unmodified from the proposed IRPS.

Accordingly, and except as discussed above, the Board adopts IRPS 08-1 as proposed.

### **C. Regulatory Procedures**

#### *Regulatory Flexibility Act*

The Regulatory Flexibility Act requires that NCUA prepare an analysis describing any significant economic impact agency rulemaking may have on a substantial number of small credit unions. 5 U.S.C. 601 et seq. For purposes of this analysis, NCUA considers credit unions under \$10 million in assets as small credit unions. Since the requirements in this IRPS are generally restatements of requirements in other laws, NCUA does not believe this IRPS will have a significant economic impact on a substantial number of small credit unions.

#### *Paperwork Reduction Act*

This IRPS contains an application requirement. As required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507(d), NCUA submitted a copy of the proposed IRPS to the Office of Management and Budget (OMB) for its review and approval. OMB approval of the Collection of Information is still pending.

*Executive Order 13132*

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. This IRPS applies to all federally-insured credit unions, but does not have substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. NCUA has determined that this IRPS does not constitute a policy that has federalism implications for purposes of the executive order.

*The Treasury and General Government Appropriations Act, 1999 - - Assessment of Federal Regulations and Policies on Families*

The NCUA has determined that the IRPS would not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act of 1999, Pub. L. 105-277, 112 Stat. 2681 (1998).

By the National Credit Union Administration Board, on July 24, 2008.

**Mary Rupp**

*Secretary of the Board*

**Authority:** 12 U.S.C. 1752a, 1756, 1766, 1785.

**Interpretive Ruling and Policy Statement 08-1.**

**Guidance Regarding Prohibitions Imposed by Section 205(d) of the Federal Credit Union Act**

**I. Background.**

This Interpretive Ruling and Policy Statement (IRPS) provides requirements, direction, and guidance to federally-insured credit unions (insured credit unions) and individuals regarding the prohibition imposed by operation of law by Section 205(d) of the Federal Credit Union Act (FCU Act) (12 U.S.C. 1785(d)). Section 205(d)(1) provides that, except with the prior written consent of the National Credit Union Administration (NCUA) Board, a person who has been convicted of any criminal offense involving dishonesty or breach of trust, or has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such offense may not:

- become, or continue as, an institution affiliated party with respect to any insured credit union; or



- otherwise participate, directly or indirectly, in the conduct of the affairs of any insured credit union.

Section 205(d)(1)(B) further provides that an insured credit union may not allow any person described above to engage in any conduct or to continue any relationship prohibited by Section 205(d). The statute imposes a ten-year ban against the NCUA Board granting consent for a person convicted of certain crimes enumerated in Title 18 of the United States Code. In order for the NCUA Board to grant consent during the ten-year period, the NCUA Board must file a motion with, and obtain the approval of, the sentencing court. (Section 205(d)(2)). Finally, Section 205(d)(3) states that “whoever knowingly violates” (d)(1)(A) or (d)(1)(B) is committing a felony, punishable by up to five years in jail and a fine of up to \$1,000,000 a day.

This IRPS provides guidance to credit unions and individuals regarding who is subject to the prohibition provision of Section 205(d). The IRPS defines what offenses come within the prohibition provision of Section 205(d) and thus require an application for the NCUA Board’s consent to participate in the affairs of an insured credit union. The IRPS also identifies certain offenses that will be excluded from Section 205(d) and do not require the NCUA Board’s consent. In order to assist those who may need the consent of the NCUA Board to participate in the affairs of an insured credit union, the IRPS explains the procedures to request such consent, specifies the application form that must be used, clarifies the duty imposed on credit unions by Section 205(d), and identifies the factors the NCUA Board will consider in deciding whether to provide such

consent. Finally, the IRPS explains how an applicant could appeal a decision by the NCUA Board denying an application for its consent.

## **II. Policies and Procedures Regarding Prohibitions Imposed by Section 205(d).**

### **A. Scope of Section 205(d) of the FCU Act.**

#### *1. Persons covered by Section 205(d):*

##### **(a) Institution-affiliated parties.**

Section 205(d) of the FCU Act applies to institution-affiliated parties, as defined by Section 206(r) of the FCU Act (12 U.S.C. 1786(r)), and others who are participants in the conduct of the affairs of an insured institution. Institution-affiliated party means:

(1) Any committee member, director, officer, or employee of, or agent for, an insured credit union;

(2) any consultant, joint venture partner, and any other person as determined by the Board (by regulation or on a case-by case basis) who participates in the conduct of the affairs of an insured credit union; and

(3) any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in—

(i) any violation of any law or regulation;

(ii) any breach of fiduciary duty; or

(iii) any unsafe or unsound practice,

which caused or is likely to cause more than a minimal financial loss to, or a significant adverse effect on, the insured credit union.

(Section 206(r)).

All officials, committee members and employees of an insured credit union fall within the scope of Section 205(d) of the FCU Act. Additionally, anyone NCUA determines to be a de facto employee, applying generally applicable standards of employment law, will also be subject to Section 205(d).

Under Section 206(r), independent contractors are considered institution-affiliated parties if they knowingly or recklessly participate in violations, unsafe or unsound practices or breaches of fiduciary duty which are likely to cause significant loss to, or a significant adverse effect on, an insured credit union. As a general rule, an independent contractor who influences or controls the management or affairs of an insured credit union, would be covered by Section 205(d). In addition, a “person” for purposes of Section 205(d) means an individual, and does not include a corporation, firm or other business entity.

(b) Participants in the affairs of an insured credit union.

A person who does not meet the definition of institution-affiliated party is nevertheless prohibited by Section 205(d) if he or she is considered to be participating, directly or indirectly, in the conduct of the affairs of an insured credit union. Whether persons who are not institution-affiliated parties are covered depends upon their degree of influence or control over the management or affairs of an insured institution. Those who exercise major policymaking functions of an insured institution would be deemed participants in the affairs of that institution and covered by Section 205(d). Participants in the affairs of

a credit union is a term of art and is not capable of more precise definition. As the OTS stated in the preamble to its regulation regarding Section 19 of the FDIA:

Given the changes in banking, including financial modernization and the rapid pace of technology, a regulatory listing of activities that constitute participation is neither practical nor advisable.

Accordingly, like FDIC's [Statement of Policy], the interim final rule does not define precisely what activities constitute "participation."

Rather, agency and court decisions will provide the guide as to what standards will be applied. As a general proposition, however, participation will depend upon the degree of influence or control over the management or affairs of the [insured credit union]. Those who exercise major policymaking functions at [an insured credit union] would fall within this category.

72 FR 25948, at 25949 (May 8, 2007).

NCUA agrees with that view and will not define what constitutes participation in the conduct of the affairs of an insured credit union but rather will analyze each individual's conduct on a case-by-case basis and make a determination.

*2. Offenses covered by Section 205(d):*

Except as indicated in paragraph (3), below, an application requesting the consent of the NCUA Board under Section 205(d) is required where any adult, or minor treated as an adult, has received a conviction by a court of competent jurisdiction for any criminal offense involving dishonesty or breach of trust, (a covered offense) or where such person has entered a pretrial diversion or similar program regarding a covered offense. The following definitions apply:

(a) Conviction. There must be a conviction of record. Section 205(d) does not apply to arrests, pending cases not brought to trial, acquittals, or any conviction which has been reversed on appeal. A conviction with regard to which an appeal is pending will require an application until or unless reversed. A conviction for which a pardon has been granted will require an application.

(b) Pretrial Diversion or Similar Program. A pretrial diversion program, whether formal or informal, is characterized by a suspension or eventual dismissal of charges or criminal prosecution upon agreement by the accused to treatment, rehabilitation, restitution, or other non-criminal or non-punitive alternatives. Whether a program constitutes a pretrial diversion is determined by relevant federal, state or local law, and will be considered by the NCUA Board on a case-by-case basis.

(c) Dishonesty or Breach of Trust. The conviction or entry into a pretrial diversion program must have been for a criminal offense involving dishonesty or breach of trust.

“Dishonesty” means directly or indirectly to cheat or defraud; to cheat or defraud for monetary gain or its equivalent; or wrongfully to take property belonging to another in violation of any criminal statute. Dishonesty includes acts involving want of

integrity, lack of probity, or a disposition to distort, cheat, or act deceitfully or fraudulently, and may include crimes which federal, state or local laws define as dishonest.

“Breach of trust” means a wrongful act, use, misappropriation or omission with respect to any property or fund which has been committed to a person in a fiduciary or official capacity, or the misuse of one's official or fiduciary position to engage in a wrongful act, use, misappropriation or omission.

Whether a crime involves dishonesty or breach of trust will be determined from the statutory elements of the crime itself. All convictions for offenses concerning the illegal manufacture, sale, distribution of or trafficking in controlled substances shall require an application for the NCUA Board's consent under Section 205(d).

3. Offenses not covered by Section 205(d):

(a) De minimis Offenses. Approval is automatically granted and an application for the NCUA Board's consent under Section 205(d) will not be required where the covered offense is considered de minimis, because it meets all of the following criteria:

- (1) There is only one conviction or entry into a pretrial diversion program of record for a covered offense;
- (2) The offense was punishable by imprisonment for a term of less than one year and/or a fine of less than \$1,000, and the punishment imposed by the court did not include incarceration;

- (3) The conviction or pretrial diversion program was entered at least five years prior to the date an application would otherwise be required;
- (4) The offense did not involve an insured depository institution or insured credit union; and
- (5) The NCUA Board or any other federal financial institution regulatory agency has not previously denied consent under Section 205(d) of the FCU Act or Section 19 of the FDIA, respectively, for the same conviction or participation in a pretrial diversion program.

Any person who meets the foregoing criteria must be covered by a fidelity bond to the same extent as other employees in similar positions. An insured credit union may not allow any person to participate in its affairs, even if that person has a conviction for what would constitute a de minimis covered offense, if the person cannot obtain required fidelity bond coverage.

Any person who meets the foregoing criteria for a de minimis offense shall disclose the presence of the conviction or pretrial diversion program to all insured credit unions or other insured institutions in the affairs of which he or she intends to participate.

(b) Youthful Offender Adjudgments. An adjudgment by a court against a person as a “youthful offender” under any youth offender law, or any adjudgment as a “juvenile delinquent” by any court having jurisdiction over minors as defined by state law does not

require an application for the NCUA Board's consent under Section 205(d). Such adjudications will not be considered convictions for criminal offenses.

(c)Expunged convictions. A conviction which has been completely expunged is not considered a conviction of record and will not require an application for the NCUA Board's consent under Section 205(d).

B. Duty imposed on credit unions.

Section 205(d) imposes a duty upon every insured credit union to make a reasonable inquiry regarding the history of every applicant for employment. NCUA believes that inquiry should consist of taking steps appropriate under the circumstances, consistent with applicable law, to avoid hiring or permitting participation in its affairs by a person who has a conviction or participation in a pretrial diversion program for a covered offense. The NCUA believes that at a minimum, each insured credit union should establish a screening process which provides the insured credit union with information concerning any convictions or pretrial diversion programs pertaining to a job applicant. This would include, for example, the completion of a written employment application which requires a listing of all convictions and pretrial diversion programs. When the credit union learns that a prospective employee has a prior conviction or entered into a pretrial diversion program for a covered offense, the credit union must submit an application requesting the NCUA Board's consent under Section 205(d) prior to hiring the person or otherwise permitting him or her to participate in its affairs.



If an insured credit union discovers that an employee, official, or anyone else who is an institution-affiliated party or who participates, directly or indirectly, in its affairs, is in violation of Section 205(d), the credit union must immediately place that person on a temporary leave of absence from the credit union and file an application seeking the NCUA Board's consent under Section 205(d). The person must remain on such temporary leave of absence until such time as the NCUA Board has acted on the application. When NCUA learns that an institution-affiliated party or a person participating in the affairs of an insured credit union should have received the NCUA Board's consent under Section 205(d) but did not, NCUA will look at the circumstances of each situation to determine whether the inquiry made by the credit union was reasonable under the circumstances.

C. Procedures for Requesting the NCUA Board's Consent Under Section 205(d).

Section 205(d) of the FCU Act serves, by operation of law, as a statutory bar to participation in the affairs of an insured credit union, absent the written consent of the NCUA Board. When an application for the NCUA Board's consent under Section 205(d) is required, the insured credit union must file a written application using the attached form with the appropriate NCUA Regional Director. The purpose of an application is to provide the applicant an opportunity to demonstrate that, notwithstanding the bar, the person is fit to participate in the conduct of the affairs of an insured credit union without posing a risk to its safety and soundness or impairing public confidence in that institution. Such an application should thoroughly explain the circumstances surrounding the conviction or pretrial diversion program. The applicant may also

address the relevant factors and criteria the NCUA Board will consider in determining whether to grant consent, specified below. The burden is upon the applicant to establish that the application warrants approval.

The application must be filed by an insured credit union on behalf of a person unless the NCUA Board grants a waiver of that requirement and allows the person to file an application in their own right. Such waivers will be considered on a case-by-case basis where substantial good cause for granting a waiver is shown.

D. Evaluation of Section 205(d) Applications.

The essential criteria used by the NCUA Board in assessing an application for consent under Section 205(d) are whether the person has demonstrated his or her fitness to participate in the conduct of the affairs of an insured credit union, and whether the employment, affiliation, or participation by the person in the conduct of the affairs of the insured credit union may constitute a threat to the safety and soundness of the institution or the interests of its members or threaten to impair public confidence in the insured credit union.

In evaluating an application, the NCUA Board will consider:

1. The conviction or pretrial diversion program and the specific nature and circumstances of the covered offense;
2. Evidence of rehabilitation, including the person's reputation since the conviction or pretrial diversion program, the person's age at the time of conviction or

pretrial diversion program, and the time which has elapsed since the conviction or pretrial diversion program;

3. Whether participation, directly or indirectly, by the person in any manner in the conduct of the affairs of the insured credit union constitutes a threat to the safety or soundness of the insured credit union or the interest of its members, or threatens to impair public confidence in the insured credit union;
4. The position to be held or the level of participation by the person at the insured credit union;
5. The amount of influence and control the person will be able to exercise over the management or affairs of the insured credit union;
6. The ability of management of the insured credit union to supervise and control the person's activities;
7. The applicability of the insured institution's fidelity bond coverage to the person;
8. For state chartered, federally-insured credit unions, the opinion or position of the state regulator; and
9. Any additional factors in the specific case that appear relevant.

The foregoing criteria will also be applied by the NCUA Board to determine whether the interests of justice are served in seeking an exception in the appropriate court when an application is made to terminate the ten-year ban for certain enumerated offenses in violation of Title 18 of the United States Code prior to its expiration date. NCUA believes such requests will be extremely rare and will be made only upon a showing of compelling reasons.

Some applications can be approved without an extensive review because the person will not be in a position to present any substantial risk to the safety and soundness of the insured credit union. Persons who will occupy clerical, maintenance, service or purely administrative positions, generally fall into this category. A more detailed analysis will be performed in the case of persons who will be in a position to influence or control the management or affairs of the insured credit union. Approval by the NCUA Board will be subject to the condition that the person shall be covered by a fidelity bond to the same extent as others in similar positions.

In cases in which the NCUA Board has granted a waiver to allow a person to file an application in their own right, approval of the application will be conditioned upon that person disclosing the presence of the conviction to all insured credit unions or other insured financial institutions in the affairs of which he or she wishes to participate.

When deemed appropriate, approval may also be subject to the condition that the prior consent of the NCUA Board will be required for any proposed significant changes in the person's duties and/or responsibilities. Such proposed changes may, in the discretion of the appropriate Regional Director, require a new application for the NCUA Board's consent. When approval has been granted for a person to participate in the affairs of a particular insured credit union and subsequently that person seeks to participate in the affairs of another insured credit union, approval does not automatically follow. In such cases, another application must be submitted. Moreover, any person who has received consent from the NCUA Board under Section 205(d) and subsequently wishes to

become an institution affiliated party or participate in the affairs of an FDIC-insured institution, he or she must obtain the prior approval of the FDIC pursuant to Section 19 of the FDIA.

E. Right to request a hearing following the denial of an application under Section 205(d).

If the NCUA Board withholds consent under Section 205(d), the insured credit union (or in the case where a waiver has been granted, the individual that submitted the application) may request a hearing by submitting a written request within 30 days following the date of the NCUA Board's action. The NCUA Board will apply the process contained in regulations governing prohibitions based on felony convictions, found at Part 747, Subpart D of Title 12, Code of Federal Regulations, to any request for a hearing. The insured credit union (or in the case where a waiver has been granted, the individual that submitted the application) may also waive a hearing and request that the NCUA Board determine the matter on the basis of written submissions.